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No. (1)

Supreme Court, U.S.
FILED

09-164 AUG 6 - 2009

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William K. Suter, Clerk

In The

Supreme Court of the United States

GARY ALLAN RICHMOND, as Personal Representative for the Estate of Kyle Dalton Richmond,

Petitioner,

v.

PEACEHEALTH MEDICAL GROUP, a Washington corporation doing business in Oregon,

Respondent,

and

EUGENE EMERGENCY PHYSICIANS, P.C.,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Oregon

PETITION FOR A WRIT OF CERTIORARI

GARY A. RICHMOND
Pro Se Petitioner
637 64th Street
Springfield, Oregon 97478
(775) 291-9208

QUESTION PRESENTED

Whether the trial court violated Plaintiff/ Petitioner's due process rights under the 14th Amendment of the United States Constitution by submitting instructions to the jury that were contradictory to what the court led counsel to believe it would submit during the trial and so fundamentally unfair as to deprive Petitioner of a fair trial and to due process of law.

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OPINION BELOW

The Oregon Court of Appeals did not publish an opinion in this case. The Oregon Supreme Court affirmed without opinion the decision of the Oregon Court of Appeals. The decisions are reprinted in the appendix.

JURISDICTION

The Oregon Supreme Court issued its opinion on April 10, 2009 and signed the order denying review of the Oregon Court of Appeals decision affirming the trial court's decision without opinion on April 22, 2009. Jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257(a) to review the state supreme court's opinion.

CONSTITUTIONAL PROVISION

U.S.C.A. Const. Amend. 14 provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL QUESTION

The justiciable federal question is whether a party is denied federal due process under U.S.C.A. Const. Amend. 14 in a wrongful death trial when the strategy and evidence presented at trial is guided by a pre-trial ruling on a critical causation instruction to be presented to the jury; the instruction is confirmed by two orders during the course of the trial, and then the court fails to give the special instruction to the jury, the absence of which is so prejudicial as to infect the entire outcome of the trial.

STATEMENT OF FACTS

This is a wrongful death case arising out of an underlying claim for negligence in which it was alleged that the Defendant negligently treated and released a mentally ill patient who was admitted to an emergency facility for attempted suicide. The patient subsequently committed suicide. The complaint further alleged that Defendant never forwarded to the subsequent treating physician critical medical information.

Plaintiff/Petitioner's burden was to present evidence of "cause in fact," by showing either that the defendant's conduct was the "but-for" cause of the Plaintiff/Petitioner's harm or, in the case of multiple potential causes, that it was a "substantial factor" in bringing about the harm. *Joshi v. Providence Health System*, 342 Or. 152, 149 P.3d 1164 (2006) ("lost

chance of survival" theory did not apply in wrongful death action to allow proof of causation by evidence that physicians' negligence deprived patient of chance of surviving stroke he suffered; wrongful statute required proof that a defendant's negligent act or omission caused the decedent's death). However, the trial court also ruled in a motion in limine that the decedent could not be held liable for his own death pursuant to the holding in *Cole v. Multnomah County,* 239 Or. App. 211, 592 P.2d 221 (1979) (where inmate contended that the failure of jail officials to furnish medical attention or otherwise prevent him from attempting suicide was a negligent breach of duty, so that the acts which the Plaintiff/Petitioner's mental illness allegedly caused him to commit were the very acts which defendants allegedly had a duty to prevent, those acts could not, as a matter of law, constitute contributory negligence).

Prior to the final instructions to the jury, the trial court twice agreed to give the instruction that the decedent could not legally be held liable for his own death. In the first, the trial court agreed to give the instruction following Plaintiff/Petitioner's counsel's objection:

> MR. BARTON: I would add, that would be a back-door abrogation of Cole vs. Multnomah County, the pretrial motion in limine wherein fault or culpability of the plaintiff is not relevant in the suicide case as a matter of law under the Oregon Court of

> Appeals decision that's already been ruled upon apart in a motion in limine.
>
> In addition, as an evidentiary matter, in the prior trial, two different ways – and I have submitted a proposed instruction in keeping with that, and I'm now going to ask that the court alternatively in exercise of its discretion, to instruct the jury, that in keeping with *Cole vs. Multnomah County* and the pretrial motion in limines, that the fault or culpability of this young man in question is not relevant in this trial.
>
> THE COURT: I intend to do so, Mr. Barton, in light of this testimony. Now, there will be no mention of the existence or nonexistence of a suicide note. Period. In this trial. I do not want to hear the words "Suicide note." Period. Do you understand me?

[Narrative Statement Tr. 518:19-519:13].

The trial agreed to give the instruction a second time over the objections of the defendant following the testimony of one of the defense experts:

> MR. DeFREEST: With regard to the third paragraph of causation, the instruction as a matter of law regarding Kyle not legally at fault, I think that was based on *Cole vs. Multnomah County*, and the jury is not asked to be – to determine the fault of Kyle Richmond in this case, and thus I think it's somewhat confusing. And *Cole* is distinguishable because we haven't alleged contributor fault. *Cole* was not a wrongful death case. It

> did not involve a similar jury instruction. And I think if my recollection is correct, *Cole* was an in custody attempt, so that would be distinguishing from this scenario. So I would ask the causation paragraph three to be removed.
>
> THE COURT: Go ahead.
>
> MR. BARTON: Your Honor, I think there is a lingering innuendo all the way through this record, in the transcript, some fashion that there are thirty thousand suicides a year, and you can't stop it.
>
> THE COURT: Well, I think even with this last witness, that the testimony you elicited on causation, Mr. DeFreest, requires me to give that instruction based upon the testimony of your own witnesses. Next?

[Narrative Statement Tr. 616:14-617:10].

With two affirmations of the trial court's intent to give the *Cole* instruction, Plaintiff/Petitioner's counsel justifiably relied on the trial court's assurance that it would be given and examined the witnesses with the knowledge that an instruction would be given that the decedent could not be legally found at fault for his own death.

However, at the end of the trial, the *Cole* instruction was withdrawn despite that the trial court agreed it was a correct statement of the law even as it withdrew the instruction:

THE COURT: Mr. Barton, one thing that I am very concerned about giving is your requested instruction that I instruct you as a matter of law that Kyle Richmond is not legally at fault by his act of suicide May 15, 2003. The *Cole* case said that as a matter of law he couldn't be found negligent, contributorily negligent. What I'm afraid of here is the issue of causation.

MR. BARTON: Right.

THE COURT: And I think that's a very dangerous –

MR. BARTON: I'm trying to think how to modify it.

THE COURT: So that a jury can understand it, I think it would be very difficult to modify. I mean if somebody starts arguing the idea of contributory negligence of Kyle Richmond, I'm going to sustain an objection, because I think that's consistent with the *Cole* case.

I mean, I don't think that you can argue that Kyle was negligent, but it certainly could be argued that – well, the court goes on in the *Cole* case, which I find interesting, "If plaintiff was not mentally ill or if corrections officials were reasonably unaware of any illness, then defendants prevail because they were not negligent, not because plaintiff was contributorily negligent." And I think that the defendant in this case and Mr. DeFreest are entitled to argue sole cause.

MR. BARTON: I think that's right. I can't keep them off that.

THE COURT: And that's why I went with 21.06, the sole cause instruction, which I think is appropriate in this case. So my inclination is to take it out, Mr. Barton. I just think that it's – I don't know how it could be modified to be consistent with cause. So I think what I'm going to do is err on the side of caution here and take that out.

MR. BARTON: All right. And may I have my assignment of error?

THE COURT: Yes, you may – both of you need to make your exceptions.

[Narrative Statement Tr. 874:10-875:24].

THE COURT: Mr. Barton, you may take exceptions to the court's instructions.

MR. BARTON: My only exception is to the failure to give the language, and I will read it into the records.

Quote, I instruct you as a matter of law that Kyle Richmond is not legally at fault by his act of suicide on May 15th, 2003.

And my authority is *Cole v. Multnomah County*, 39 Or. App. 211. And in a quick summary, any concerns there may be as far as causation being taken away as a defense are certainly covered by the earlier portions of the instructions that say the defendant has made no claims and the burden of proof in all

> issues is on the plaintiff. Period. That takes care of it.
>
> And respectfully, I think, given the texture of the case, the way it's been defended, the arguments, the subliminal messages, that that is on the table, to try to in some fashion, blame Kyle Richmond, as if no one knew and this snuck up on everybody, and therefore there's a level of culpability. And *Cole v. Multnomah County* addresses that and says that the very shortcomings of mental health and nature of the deceased cannot be used against him.
>
> Now, you can argue causation all you want, but not implicit arguments of culpability or fault. And I feel that's what's been done, and it should have been given, and that's my only exception, your Honor.
>
> THE COURT: You may have your exception.

[Narrative Statement Tr. 1012:5-1013:8].

In summary, Plaintiff/Petitioner was told the trial court would give the requested *Cole* instruction prior to Plaintiff/Petitioner's case on a pre-trial motion and then again on two separate occasions during defendant's case-in-chief. Reasonably believing the instruction would be given, Plaintiff/Petitioner's counsel based much of his case strategy, his objections to questions of defense witnesses and cross examination, knowing that the instruction would be given. The trial court's last minute reversal of its decision to give

the *Cole* instruction after it had been ruled that it would be given twice on Motions in Limine and confirmed twice during the trial itself, not only blindsided Plaintiff/Petitioner and undermined the effectiveness of Plaintiff/Petitioner's argument, it materially prejudiced Plaintiff/Petitioner's entire case by foreclosing the opportunity to develop a case strategy based on the instruction actually given.

REASON FOR GRANTING THE PETITION

The state court of last resort has sanctioned a departure from the acceptable and usual course of judicial proceedings of the trial court to such an extent so as to call for an exercise of this Court's supervisory power. This Court should find that an ailing jury instruction in a civil case that so infects the entire trial may violate due process. While several State courts have decided this question on federal due process grounds, this Court has yet to address the question of to what degree an improper jury instruction may rise to the level of a due process violation in a civil case.

In *Cupp v. Naughten*, 414 U.S. 141 (1973), this Court held that a state court's jury instruction could be overturned if it was established that it violated some right guaranteed by the Fourteenth Amendment. Although the burden of demonstrating that an erroneous instruction was so prejudicial that it will

support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process", *Cupp v. Naughten,* 414 U.S., at 147, 94 S.Ct., at 400, 38 L.Ed.2d 368, not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned,'" *Id.,* at 146, 94 S.Ct., at 400.

The cases in which this Court has determined there are structural errors at trial rising to the level of due process violations are a limited class of cases, among which is an erroneous reasonable doubt jury instruction, *Cupp v. Naughten*, *supra*. All of the cases addressing the propriety of a jury instruction in the Circuits and in this Court, however, have arisen in the context of criminal cases and this Court's determination that an erroneous jury instruction so prejudicial as to infect the entire trial may violate the due process, has never been extended to civil trials as it appears no such case has reached this Court. The States, however, have addressed faulty jury instructions that violate the due process clause of the 14th Amendment too numerous to mention here. In this case, the trial court and subsequent Oregon appellate courts ignored its own precedents to sanction a decision that departs from Oregon law. Plaintiff/ Petitioner's requested jury instruction was a correct statement of the law, properly pleaded, and should

have been submitted to the jury as the trial court concluded three times.

The special instruction was based on the holding in *Cole v. Multnomah County,* 239 Or. App. 211, 592 P.2d 221 (1979) (if the acts which the Plaintiff/ Petitioner's mental illness allegedly caused him to commit were the very acts which defendants allegedly had a duty to prevent, those acts could not, as a matter of law, constitute contributory negligence). The question for a trier of fact in determining whether a defendant is negligent then becomes whether the Plaintiff/Petitioner is mentally ill, whether defendant is reasonably unaware of a mental illness and finally, whether Plaintiff/Petitioner's mental illness caused him to commit acts that defendant had a duty to protect against. The *Cole* decision came after the Oregon court of appeals reviewed case law from California and Washington. *Vistica v. Presbyterian Hospital,* 432 P.2d 193 (1967); *Hunt v. King County*, 481 P.2d 593 (1971). Both decisions remain intact and have been cited repeatedly by appellate courts throughout the country; indirectly affirming the Oregon Court of Appeals decision in *Cole.*

In *Sanborg v. Blue Earth County* for example, the trustee for the next of kin of a jail inmate brought action against the county for negligence and civil rights violations after the inmate's suicide. 601 N.W.2d 192, 198 (Minn. App. 1999). On appeal Plaintiff/ Petitioner argued the trial court's refusal to instruct the jury that jail personnel had a duty of reasonable care to protect the inmate was reversible error. *id.*

The Minnesota court held in this type of case, "a trial judge may rule, as a matter of law, that the patient could not be at fault because he lacked the capacity to be responsible for his own well being, and that the obligation of self care transferred to the health care provider when it admitted the patient into its care." *id.*

Similarly in *Cowen v. Doering*, the New Jersey Supreme Court held " . . . when the actions taken by a patient as a result of mental illness are the very acts which the medical provider had a duty to prevent, the providers own failure to prevent suicide should not create its own defense." *Cowen v. Doering*, 545 A.2d 159, 162-164 (1988).

Seven years after *Cole*, the Oregon court of appeals reaffirmed their holding upon review of a suicide case in the context of a Workmen's Compensation claim by adopting the decision of the Texas Supreme Court in *Saunders v. Texas Employers' Ins. Ass'n*, 526 S.W.2d 515, 517, (Tex. 1975):

> "A number of jurisdictions, upon recognizing the advances made by medical science and psychiatry relating to the study of human reasoning and behavior have concluded that a suicide cannot be considered to have been intentionally self-inflicted if, in spite of the fact that the act is a conscious one, the suicide can be shown to have resulted from the deceased's inability to control the impulse to kill himself . . . " *McGill v. SAIF*, 81 Or. App. 210, 214, 724 P.2d 905 (1986).

There is no legal question that the special jury instruction based on the longstanding principle articulated by the Oregon court of appeals in *Cole* is the law in Oregon.

In this case, the state court of last resort has sanctioned a departure from the acceptable and usual course of judicial proceedings of the trial court to such an extent so as to call for an exercise of this Court's supervisory power. It is inherently unfair and a violation of fundamental principles of substantial justice and fair play for a trial court to determine that a critical jury instruction will be given, twice affirm that it will be given during the course of the trial, and then arbitrarily fail to give the instruction at the close of the case, over counsel's objection.

The trial court led Petitioner's counsel to believe it would submit a special jury instruction from the beginning of the case, and Petitioner developed his case and strategy assuming that the instruction that the decedent could not be held negligent for his own death would be given. In the end, a "sole cause" jury instruction was given but the special instruction that the decedent could not be found to be the sole cause of his death was erroneously omitted. Failure to give the instruction was so prejudicial as to infect the entire trial as the absence of the instruction effectively permitted the jury to conclude that if the decedent was found to be at fault, any negligence of the Defendant was barred. The underlying purpose of the special instruction was to instruct the jury that Oregon law directs that where Plaintiff/Petitioner's mental

illness caused him to commit acts that defendants had a duty to prevent, Plaintiff/Petitioner could not be found at fault or comparatively negligent.

The effectiveness of Plaintiff/Petitioner's argument at trial was incurably impaired when the actual instructions given by the trial court were substantially different and materially prejudicial from those the trial court led Plaintiff/Petitioner's counsel to believe it would submit to the jury. The omission of the special instruction was fatally prejudicial. The actual instructions given repudiated the arguments, testimony elicited by Plaintiff/Petitioner and Plaintiff/Petitioner's essential case that had been based on the belief that the special instruction would be given. Plaintiff/Petitioner's case throughout the trial was founded upon a theory that the court rejected in the eleventh hour. The rules were arbitrarily changed at the end of the game, offending traditional notions of fair play and substantial justice that is central to due process.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Gary Richmond
Pro Se Petitioner
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FILED: December 10, 2008

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

GARY ALLAN RICHMOND, as
Personal Representative for the Estate of
Kyle Dalton Richmond, Deceased,
Plaintiff-Appellant,

v.

PEACEHEALTH, dba PeaceHealth Medical
Group a Washington corporation,
doing business in Oregon,
Defendant-Respondent,

and

EMERGENCY PHYSICIANS, PC,
Defendant.

Lane County Circuit Court
160609343

A136107

Lyle C. Velure, Judge.

Submitted on November 07, 2008.

Before Haselton, Presiding Judge, and Armstrong, Judge, and Rosenblum, Judge.

Attorney for Appellant: Gary A. Richmond *pro se*.

Attorney for Respondent: Eric S. DeFreest.

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

[ ] No costs allowed
[X] Costs allowed, payable by Appellant.

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

GARY ALLAN RICHMOND, as Personal Representative for the ESTATE OF KYLE DALTON RICHMOND, deceased,

Plaintiff,

v.

PEACEHEALTH, a Washington corporation doing business in Oregon as PEACEHEALTH MEDICAL GROUP,

Defendant.

Case No. 16-06-09343

GENERAL JUDGMENT ON VERDICT

(Filed Jun. 1, 2007)

The above entitled cause came on regularly for trial on the 15th day of May 2007, before the Honorable Lyle C. Velure Circuit Court Judge, and a jury was duly empaneled and sworn.

BE IT REMEMBERED that on the 24th day of May 2007 the jury duly empaneled to try the above-entitled action returned into Court a verdict in favor of the Defendant PeaceHealth, dba PeaceHealth Medical Group, and against the Plaintiff and the form of the verdict was as follows:

"IN THE CIRCUIT COURT OF THE
STATE OF OREGON FOR LANE COUNTY

GARY ALLEN RICHMOND, as personal representative for the estate of KYLE DALTON RICHMOND, deceased, Plaintiff, v. PEACEHEALTH, a Washington corporation doing business in Oregon as PEACEHEALTH MEDICAL GROUP, Defendant.	Case No. 16-06-09343 VERDICT

We, the jury, nine or more of our number concurring, find:

(1) Was the defendant negligent in one or more of the ways alleged by plaintiff which caused the death of Kyle Dalton Richmond?

ANSWER: No (Yes or No)

If your answer to question (1) is "no" "your verdict is for the defendant. Do not answer any further questions. If your answer to question (1) is "yes", then proceed to answer question (2).

(2) What are the amount of damages to the Estate of Kyle Dalton Richmond?

ANSWER:

Non Economic Damages $_____

Economic Damages $_____

At least the same nine of you who agreed to answer question (1) "yes" must agree on the answer to question (2).

Dated this 24th day of May, 2007.

/s/ William J. Hunt
Presiding Juror"

NOW THEREFORE, based upon the jury verdict,

IT IS HEREBY ORDERED AND ADJUDGED that Defendant PeaceHealth, dba PeaceHealth Medical Group, have and recover judgment against Plaintiff and in favor of Defendant, that the case is dismissed with prejudice, and that Defendant is hereby awarded its costs, disbursements and prevailing party fee in an amount to be determined by way of a Supplemental Judgment pursuant to ORCP 68.

DATED: 5/30, 2007.

/s/ Lyle C. Velure
Lyle C. Velure
Circuit Court Judge

SUBMITTED BY:
Eric S. DeFreest, OSB #92047
Of Attorneys for Defendant PeaceHealth

IN THE SUPREME COURT
OF THE STATE OF OREGON

GARY ALLAN RICHMOND, as
Personal Representative for the Estate of
Kyle Dalton Richmond, Deceased,
Plaintiff-Appellant,
Petitioner on review,

v.

PEACEHEALTH, dba PeaceHealth
Medical Group, a Washington corporation,
doing business in Oregon,
Defendant-Respondent,
Respondent on review.

and

EMERGENCY PHYSICIANS, PC,
Defendant.

Court of Appeals
A136107

S057050

ORDER DENYING REVIEW

Upon consideration by the court.

The court has considered the petition for review and orders that it be denied.

April 22, 2009 /s/ Paul J. De Muniz
DATE CHIEF JUSTICE

c: Michael D Vergamini
Eric S. DeFreest

ORDER DENYING REVIEW

REPLIES SHOULD BE DIRECTED TO:
State Court Administrator, Records Section,
Supreme Court Building, 1163 State Street,
Salem, OR 97301-2563

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(2)

Supreme Court, U.S.
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No. 09-164

IN THE
SUPREME COURT OF THE UNITED STATES

GARY ALLAN RICHMOND, as Personal Representative for the Estate of Kyle Dalton Richmond, Deceased
Petitioner,

v.

PEACEHEALTH MEDICAL GROUP, a Washington corporation doing business in Oregon,
Respondent,

and

EUGENE EMERGENCY PHYSICIANS, P.C.,
Respondent.

On Petition For A Writ of Certiorari To
The Court of Appeals Of The State Of Oregon

PEACEHEALTH'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COMPLIANCE

No. 09-164

GARY ALLAN RICHMOND, as Personal Representative for the Estate of Kyle Dalton Richmond, Deceased
Petitioner,

v.

PEACEHEALTH MEDICAL GROUP, a Washington corporation doing business in Oregon,
Respondent,

and

EUGENE EMERGENCY PHYSICIANS, P.C.,
Respondent.

As required by Supreme Court Rule 33.1(h), I certify that PeaceHealth's Response to Petition for a Writ of Certiorari contains 3,008 words, excluding the parts of the response that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 10, 2009.

ERIC S. DeFREEST
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CORPORATE DISCLOSURE

No. 09-164

GARY ALLAN RICHMOND, as Personal Representative for the Estate of Kyle Dalton Richmond, Deceased
Petitioner,

v.

PEACEHEALTH MEDICAL GROUP,
a Washington corporation doing business in Oregon,
Respondent,

and

EUGENE EMERGENCY PHYSICIANS, P.C.,
Respondent.

In accordance with Supreme Court Rule 30, Respondent PeaceHealth discloses it is a Washington nonprofit corporation and there is no parent or publicly held company owning 10% or more of the corporation's stock.

Executed on September 10, 2009.

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OPINION BELOW

The Oregon Court of Appeals affirmed the trial court judgment without opinion. App. 1-2. The Oregon Supreme Court is a court of discretionary review and issued an Order Denying Review. Oregon Rules of Appellate Procedure (ORAP) 9.07; App. 6-7. The Oregon courts have neither considered nor passed upon any federal question, including Petitioner's claim for failure of due process.

JURISDICTION

Petitioner asserts jurisdiction exists under 28 USCA §1257(a) to "review the state supreme court's opinion."[1] However, there is no jurisdiction under 28 USCA §1257(a) because the Oregon courts neither considered nor passed upon Petitioner's claim for failure of due process. *Webb v. Webb*, 541 U.S. 493, 495-497, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981).

The Petitioner asserts in his characterization of a Federal Question (Petition, p.2) that there existed a "pre-trial ruling on a critical causation instruction to be presented to the jury; the instruction is confirmed by two orders during the course of trial". In contrast, neither the asserted pre-trial ruling nor the asserted two orders are presented in the Petition for Writ of Certiorari or its appendices for consideration by the

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[1]The Petitioner's cover cites that it seeks a Writ of Certiorari to the Court of Appeals of the State of Oregon instead of the Oregon Supreme Court.

Court. The Petitioner fails to establish that the federal question sought to be reviewed was timely and properly raised in accordance with Supreme Court Rule 14.1(g)(i).

SUMMARY OF FACTS

Kyle Richmond was a student at the University of Oregon. On April 24 and 25, 2003, Kyle Richmond took two ingestions of medications and presented himself for treatment at the Sacred Heart Medical Center emergency department. He was initially treated and evaluated by Dr. Kenneth Starr an employee of Eugene Emergency Physicians, PC. Paula Burchett a crisis worker at Sacred Heart Medical Center also conducted an evaluation of Kyle Richmond. Dr. Starr and Paula Burchett agreed that Kyle Richmond presented a "low risk for further self-harm". On April 25, 2003, Dr. Starr discharged Kyle Richmond and he was escorted home by his sister, Shelbi Whiddon.

The discharge instructions directed Kyle Richmond to follow-up for outpatient treatment at the University of Oregon, but directed him to return to the emergency department if he experienced any worsening symptoms. Kyle Richmond did not return to the Sacred Heart Medical Center after April 25, 2003. However, he did follow the discharge instructions by presenting to the University of Oregon Student Health Center on Monday morning, April 28, 2003 and began treatment with psychiatrist Dr. Jerome Vergamini. Dr. Vergamini continued to be Kyle Richmond's treating psychiatrist from April 28, 2003, through the time Kyle

Richmond committed suicide on May 15, 2003.

At trial, the plaintiff asserted a claim for wrongful death against defendant PeaceHealth based upon three allegations of negligent acts or omissions. Defendant PeaceHealth denied negligence. Neither party alleged any claim of comparative negligence by the Petitioner's decedent, Kyle Richmond. After trial on the merits, the jury delivered a verdict in favor of the defendant on the question, "Was the defendant negligent in one or more of the ways alleged by plaintiff which caused the death of Kyle Dalton Richmond?" by answering "No." App.3-5.

ARGUMENT

The Petitioner seeks the Court's review by claiming that the state trial court violated his rights of due process as granted by the 14th Amendment of the U.S. Constitution, which states in pertinent part:

> " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . " U.S.C.A. Const. Amend XIV, § 1.

Petitioner's underlying civil case was a statutory claim seeking monetary compensation following the suicide of his son. Petitioner characterizes the claimed violation of due process as "submitting instructions to the jury that were contradictory to what the court led counsel to believe it would submit during the trial and so fundamentally unfair as to deprive Petitioner of a fair trial and to due process of law." The petition is

fundamentally flawed because it fails to identify any deprivation of life, liberty or property by the state of Oregon without due process of law.

Petitioner does not establish jurisdiction

Petitioner claims jurisdiction exists under 28 USCA §1257(a) seeking review of the state supreme court's opinion. Petition, p. 1. However, there was no opinion issued by the Oregon Supreme Court. The Oregon Supreme Court is a court of discretionary review and simply issued an order denying review. Petition, App. 6-7.

(A) Federal question. The Supreme Court's jurisdiction to review a state court decision under 28 USCA §1257 is dependent upon the presence of a federal question in the case. The Supreme Court is not a court of general jurisdiction; its powers are limited to correcting denials of federal rights in specific instances. *Walters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 106, 29 S.Ct. 220, 53 L.Ed. 417 (1909). The Supreme Court's jurisdiction is limited to issues pertaining to the constitutionality of federal or state statutes, or to certain rights, immunities, and privileges of federal origin. *Id.* Respondent PeaceHealth respectfully submits that the petition does not present a substantial federal question and that Petitioner's claimed violation of due process was neither presented to nor passed upon by the Oregon Supreme Court.

(B) Mootness. The federal question raised in a case taken to the United States Supreme Court from a state court may not be abstract or moot. The federal

question must raise a live controversy and must affect the rights of the litigants in the proceeding. *See, North Carolina v. Rice*, 404 U.S. 244, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971).

Petitioner argues that an instruction based on *Cole v. Multnomah Co.*, 239 Or.App. 211, 595 P.2d 221 (1979), should have been given by the trial court which in practical application would have directed a verdict in plaintiff's favor upon a claim of comparative negligence which was never pleaded by the defense. Respondent PeaceHealth respectfully submits that the petition does not present a substantive or procedural due process question for consideration by the court because no claim of comparative negligence was pleaded in order to found a basis for the requested instruction. The matter petitioned is moot and would not affect the rights of the litigants in the proceeding.

(C) Presentation/Jurisdiction. In order to obtain review of a state court decision in the United States Supreme Court, it must affirmatively appear from the record as a whole, either expressly or by clear implication, that the federal claim was adequately presented to the state court and was passed upon by that court.

> "It is a long-settled rule that the jurisdiction of this [U.S. Supreme] Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state

> system." *Webb v. Webb*, 541 U.S. 493, 496-497, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981).

The claimed violation of due process was not raised by Petitioner during the trial court proceedings in the case at bar. The Oregon Court of Appeals affirmed the trial court judgment without opinion. The Oregon Supreme Court denied discretionary review. The United States Supreme Court has frequently stated that when,

> "* * * the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary." *Webb v. Webb*, 541 U.S. 493, 495, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981).

Because Petitioner's present contention for violation of due process was neither adequately presented nor passed upon by the state courts of Oregon, this Court's jurisdiction for consideration by writ of certiorari is not established.

<u>Substantive and procedural due process</u>

Petitioner's brief does not state whether he claims deprivation of substantive or procedural due process.

(A) Substantive due process requires that any State action which deprives a person of life, liberty, or property must have a rational basis, and the reason for deprivation may not be so inadequate that the judiciary would characterize it as arbitrary. In contrast, as acknowledged by quotation in the Petition for a Writ of Certiorari, the trial court provided a rational basis for its decision not to give the requested special instruction. The trial court's concern with the requested instruction was not to confuse jurors on the distinction between fault and causation. Petition, p. 6-7.

It is apparent that Petitioner continues to confuse the concepts of fault and causation. At Petition, p. 13, Petitioner misstates the crux of the discussion surrounding the requested jury instruction by stating:

> "In the end, a 'sole cause' jury instruction was given but the special instruction that *decedent could not be found to be the sole cause* of his death was erroneously omitted. Failure to give the instruction was so prejudicial as to infect the entire trial as the absence of the instruction effectively permitted the jury to conclude that *if the decedent was found to be at fault, any negligence of the Defendant was barred.*" (Emphasis added) (Petition, p.13).

Petitioner did not request a special instruction that decedent could not be found to be the sole cause of his

death, nor does *Cole v. Multnomah Co.*, 239 Or.App. 211, 595 P.2d 221 (1979) stand as precedent on the concept of causation.[2] Petitioner continues to inappropriately juxtapose the concepts of fault and causation. While Petitioner had the burden of proof on causation, there was no allegation of negligence against Kyle Richmond upon which to justify giving the requested *Cole* instruction. Furthermore, the concept of contributory negligence as a complete bar to recovery was rejected in Oregon in 1971 and replaced by the concept of comparative negligence. Oregon Revised Statutes (ORS) 31.600. Yet again, it should be emphasized that defendant did not allege comparative negligence against the plaintiff's decedent.

Instructions to juries should not deal with issues outside the pleadings and the evidence, and when such instructions are requested they may be refused. *Williamson v. North Pacific Lumber, Inc.*, 43 Or. 337, 73 P. 7 (1903). The trial court may properly refuse a requested charge which is incomplete or argumentative or which might prove misleading or confusing to the jury. *Rauw v. Huling*, 199 Or. 48, 259 P.2d 99 (1953). Petitioner did not have an entitlement to the requested

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[2]Petitioner misstates that "the trial court and subsequent Oregon appellate courts ignored its own precedents to sanction a decision that departs from Oregon law." Petition, p. 10. Contributory negligence was not alleged against Petitioner's decedent, Kyle Richmond. The Petitioner's requested instruction based upon *Cole v. Multnomah Co.*, 239 Or.App. 211, 595 P.2d 221 (1979) was not precedent and was not ignored, rather it was deemed an inappropriate instruction on matters outside the pleadings.

instruction. There is no deprivation of life, liberty, or property identified by the Petitioner upon which to base the claimed violation of substantive due process.

(B) Procedural due process mandates that persons whose constitutional rights may be affected are entitled to be heard. The notice and opportunity to be heard must be extended at a meaningful time and in a meaningful manner.

There is no identified deprivation of life, liberty, or property upon which to base the claimed violation of procedural due process. Moreover, the trial court in the case below provided timely notice in accordance with long-established court procedural rules which require that jury instructions be given before counsel proceed with closing argument. Oregon Rules of Civil Procedure (ORCP) 59A; Oregon Uniform Trial Court Rules (UTCR) 6.060.

Oregon law establishes that jury instructions must be based upon the evidence presented during trial. *Williamson v. North Pacific Lumber, Inc.*, 43 Or. 337, 73 P. 7 (1903). As recognized by the Court in *Cupp v. Naughten*, 414 U.S. 141, 146-147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973), it is a well established proposition that a single instruction to a jury may not be judged in artificial isolation. A judgment is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits and instruction of a jury by the trial judge. The jury instructions are only one of several components to a trial. The trial judge explicitly stated that there was no claim by the defense asking the jury to evaluate the

fault of Petitioner's decedent, Kyle Richmond.[3] A jury is presumed to follow the instructions presented by the court. The decision not to give the Petitioner's requested instruction was not a failure of process which permitted the jury to find Kyle Richmond at fault as characterized by the Petitioner.

Petitioner's question presents no issue of constitutional law for certiorari by the United States Supreme Court. The facts of the case fall squarely within the long-standing procedures of ORCP 59A and UTCR 6.060 whereby the trial court provided appropriate and timely notice of final jury instructions to counsel.

Pursuant to ORCP 59A, proposed jury instructions are to be submitted to the trial court at the commencement of the trial. The rule further allows proposed instructions to be submitted upon questions of law developed by the evidence at any time before the court has instructed the jury. In conjunction with ORCP 59A, UTCR 6.060(5) requires "[t]he court must inform the parties before argument of the instructions that it proposes to give." In the case petitioned, the trial court explicitly made a record prior to closing arguments that jury instructions were finalized and that "I've taken out, Mr. Barton, your requested jury instruction on the *Cole* case." Tr. 882. The trial court appropriately advised counsel of the text of the written

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[3] "The defendant denies it was negligent or caused the death of Kyle Richmond. The defendant has made no claims, and the burden or proof in all issues is on the plaintiff." Jury Instructions Tr. 897, lines 3-6

jury instructions, and actually instructed the jury in open court, prior to closing argument by counsel.[4] The requirements of ORCP 59A and UTCR 6.060(5) were met. Respondent PeaceHealth respectfully submits that the petition does not present a substantial or procedural question of law justifying review by the United States Supreme Court.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[4] "THE COURT: Ladies and gentlemen, we're going to do something a little different that I think might be of assistance to you. Normally we would instruct the jury after the attorneys argued, but I'm going to instruct you before they argue so that you know what the law is before you hear the arguments. And that way, I think it will make the arguments more meaningful for you in this particular case." Jury Instructions Tr. 891:20 - 892:2.

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(3)

No. 09-164

Supreme Court, U.S.
FILED

In The
Supreme Court of the United States

GARY ALLAN RICHMOND, as Personal Representative for the Estate of Kyle Dalton Richmond,

Petitioner,

v.

PEACEHEALTH MEDICAL GROUP, a Washington corporation doing business in Oregon,

Respondent,

and

EUGENE EMERGENCY PHYSICIANS, P.C.,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Oregon

PETITIONER'S REPLY TO PEACEHEALTH'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY

Jurisdiction is established

The Oregon constitution has no due process clause. Any procedural or fairness challenge in an Oregon court is automatically made under the due process clause of the 14th Amendment. *State v. Miller*, 327 Or. 622, 635 n.10, 969 P.2d 1006 (1998) (Oregon's constitution has no due process clause). Despite that there is nothing in the record to indicate whether the state court decided this case on adequate and independent state grounds or on the federal due process question raised by Petitioner, the Oregon court of appeals could only have decided the due process assignment of error on federal grounds.

Respondent has erroneously cited *Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889, 68 L. Ed. 2d 392 (1981) in proposing that because the Oregon courts neither considered nor passed upon Petitioner's claim for failure of due process, federal jurisdiction was not raised. *Id.* On the contrary, this Court held in *Webb*, *supra*, that the jurisdiction of this Court to review the final judgment of a state court can arise only "if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Id.* at 497, 101 S.Ct. at 1892. In this case, the record indicates that an exception was preserved at the trial court and the federal question was pressed and passed upon in the state court of appeals in Petitioner's Appeal to the Oregon Court of Appeals on page 10, paragraph 6 as

part of Petitioner's First Assignment of Error. There Petitioner wrote, "It is inherently unfair for the trial court to twice affirm an instruction and then refuse to give it after all testimony is heard." Petitioner then went on to explain:

> "Finally there is an issue of fundament fairness. Plaintiff was told the trial court would give the requested instruction on two separate occasions during defendant's case-in-chief. Believing it would be, plaintiff's counsel based his objections to questions of defense witnesses and cross examination on the promised instruction. The trial court reversing itself and refusing to instruct on *Cole*; after all testimony had been given blindsided the plaintiff and denied him his due process rights to a fair hearing."

Respondent is correct that this Court may presume that where the highest state court fails to pass upon a federal question the omission is due to want of proper presentation in the state court, unless the aggrieved party can affirmatively show otherwise. *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L. Ed. 2d 572 (1969). Here, Petitioner has met his burden. There can be no dispute that Petitioner properly raised the federal due process claim before the state court of appeals under state court rules. The state court had a fair opportunity to address the federal question that is sought to be presented here. *Webb. v. Webb*, 451 U.S. 493, 501, 101 S.Ct. 1889, 1894, 68 L. Ed. 2d 392 (1981).

Most significant, there is no adequate and independent state ground upon which a procedural due process claim could have been decided by the Oregon court of appeals. This Court cannot presume that the court of appeals passed upon a federal question due to want of proper presentation because Oregon lacks a due process clause in its state constitution and relies on the federal due process clause under the 14th Amendment. Any fairness or procedural challenge in an Oregon court is automatically a challenge under the federal due process clause. *See State v. Miller*, 327 Or. 622, 635 n.10, 969 P.2d 1006, 1013 n.10 (1998) (defendant's assertion that the trial court denied him "due process of law" raises no issue of state constitutional law because the Oregon Constitution contains no due process clause. Rather, that claim asserts only those issues that arise under the Due Process Clause of the Fourteenth Amendment to the United States Constitution); *Hathorn v. Lavorn*, 457 U.S. 255, 262-265, 102 S.Ct. 2421, 2426-2428, 72 L. Ed. 2d 824 (1982) (state procedural requirements could not serve as an independent and adequate state-law ground for the state court's judgment); *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469 (1983) (when state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when adequacy and independence of any possible state-law ground is not clear from face of opinion, Supreme Court will accept as most reasonable explanation that state court decided case the way it did because it believed that federal law required it to do so);

Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985) (Supreme Court will not assume that state court decision rests on adequate and independent state grounds when state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when adequacy and independence of any possible state-law ground is not clear from face of opinion).

In this case, the claimed violation was that a critical jury instruction had been promised twice during the trial: That if Plaintiff overcame the burden of demonstrating that Defendant knew or should have known that the decedent was mentally ill and at risk for suicide, then the jury may not conclude the decedent was at fault or responsible for actions as a result of the very mental illness that Defendant had a duty to protect against ("*Cole* instruction"); specifically, that the decedent could not be found legally at fault for his own suicide. This instruction was promised twice during the trial and once during a motion in limine. When at one point testimony was elicited from a Defense witness stating that it could not be Defendant's fault because the decedent killed himself, the court promised to give the *Cole* instruction as a corrective instruction.[1] However, at the end

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[1] MR. BARTON: Your Honor, I think there is a lingering innuendo all the way through this record, in the transcript, some fashion that there are thirty thousand suicides a year, and you can't stop it.

(Continued on following page)

of the trial, the *Cole* instruction was withdrawn despite the trial court's agreement that it was a correct statement of the law even as it was withdrawn.[2] Furthermore, Plaintiff's exception made clear the *Cole* instruction had been requested throughout the trial because the evidence presented by the Defendant was confusing and misleading.

> "And respectfully, I think, given the texture of the case, the way it's been defended, the arguments, the subliminal messages, that that is on the table, to try to in some fashion, blame Kyle Richmond, as if no one knew and this snuck up on everybody, and therefore there's a level of culpability. And *Cole vs. Multnomah County* addresses that and says that the very shortcomings of mental health and nature of the deceased cannot be used

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THE COURT: Well, I think even with this last witness, that the testimony you elicited on causation, Mr. DeFreest, requires me to give that instruction based upon the testimony of your own witnesses. Next? (Tr. 618:1-10)

[2] THE COURT: So that a jury can understand it, I think it would be very difficult to modify. I mean, if somebody starts arguing the idea of contributory negligence of Kyle Richmond, I'm going to sustain an objection, because I think that's consistent with the *Cole* case. I mean, I don't think that you can argue that Kyle was negligent, but it certainly could be argued that – well, the court goes on in the *Cole* case, which I find interesting, "If plaintiff was not mentally ill or if corrections officials were reasonably unaware of any illness, then defendants prevail because they were not negligent, not because plaintiff was contributorily negligent." And I think that the defendant in this case and Mr. DeFreest are entitled to argue sole cause. (Tr. 875:22-876:11)

> against him. Now, you can argue causation all you want, but not implicit arguments of culpability or fault. And I feel that's what's been done, and it should have been given, and that's my only exception, your Honor." (Tr. 1013:20-1014:7)

As noted earlier, the trial court agreed twice during the trial with this same argument and promised to give the requested instruction. There is no doubt that the exception by Plaintiff to the trial court's ultimate refusal to give the instruction was grounded in the procedural fairness of omitting the critical jury instruction once it had been promised. There can also be no doubt that the Plaintiff gave the trial court a sufficient explanation of the substance of the objection for the court to consider the issue of fundamental fairness.

Respondent incorrectly asserts that the facts of this case fall squarely within the Oregon rules of civil procedure

It is immaterial that the trial court informed the parties prior to argument of the jury instructions it intended to give as required by the Oregon Rules of Civil Procedure, ORCP 59A.

The issue is whether the *Cole* instruction should have been given as promised during the trial. By failing to give the instruction, the trial court created an unreasonable, unnecessary and significant risk, which the trial court is obligated to protect against,

that the jury could infer the decedent could be legally at fault for his own death. While Respondent is correct that the decedent was not a party to the case, that fact is of little consequence if jurors are permitted to conclude from objectionable testimony that if decedent is at fault, the Defendant cannot therefore be at fault. The special *Cole* instruction protected against this risk. Petitioner's case centered on the instruction being given and the trial court indicated throughout that it would be given for the very reasons set forth above.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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